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STETSON UNIVERSITY
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THE CENTER FOR DISPUTE RESOLUTION

TWELFTH ANNUAL NATIONAL CONFERENCE ON
LABOR AND EMPLOYMENT LAW

"AUTONOMY AND INTERVENTION: SOME PARTS OF THE NATIONAL LABOR RELATIONS ACT PARADOX"

Delivered by:

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Belleview Mido Resort Hotel
Clearwater, Florida

What a pleasure it is to be here again in the lovely Florida springtime when there is so much unbounded promise about the future. Here we are, ever hopeful, that notwithstanding his first inning rout by the Cardinals last Saturday, Steve Avery's arm is sound and ready to overcome our sense of loss about Roger Clemens' departure. Here we are again reflecting on whether John Valentin will play his new position at second base with the same enthusiasm and verve which saw him racing deep into the hole between short and third just a few spring trainings ago to glove one so gracefully back handed and turn and throw out the runner at first.

Will Normar Garcapierra *hit* and do that too? Will the new strong arms which have been brought up from Pawtucket and Trenton steady the club and effectively supplement Gordon and the young pitcher so capable of a dazzling assortment, Aaron Sele, from Washington State University? And how good it will be to return after this afternoon's baseball to my television to watch the plucky upstart Stanford Cardinal take on Utah in San Jose "roundball," the favorite of my retiring Chief Counsel, Bill Stewart. Could there be a men and women Stanford NCAA championship -- and in the same year that the Boston Celtics sign Tim Bedford?

What a pleasure it is to be here with you again and to find out some of the answers to these questions in a series of games that I will have a chance to witness this weekend.

Last December, I had the privilege to speak to the Stetson Law School commencement ceremony and to be awarded an honorary doctorate of laws. At that time, Gary Vause invited me to come back for the Stetson Twelfth Annual National Conference on Labor and Employment Law and to deliver my fourth talk here. I have enjoyed my previous visits down here at this prestigious conference and, of course, quickly realized that the timing would be propitious -- so here I am again. Thank you for inviting me, Gary.

We are at a critical point in labor law and labor-management relations in our country today. Having just testified yesterday before the House Subcommittee on Labor/HHS Appropriations, I can tell you that we remain in Justice Holmes' words, "very much in the center of the storm."

During the past few weeks a series of articles have appeared in both *The New York Times* and *The Washington Post* which may give you a sense of some of the policy aspects of the debate. In one set of articles[1] the new organizational tactics of the AFL-CIO were described and it was said that unions would try to use a card-check strategy through which they would pressure employers with community demonstrations, emphasize reaching workers at their homes rather than at factory or shopping center facilities, and attempt to dissuade employers from resisting union organization through providing the promise or reality of an agreement into which the unions might be willing to enter. The AFL-CIO was

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[1] Steve Greenhouse, *Unions, Bruised in Direct Battles With Companies, Try A Roundabout Tactic,* THE NY TIMES, March 10, 1997, at A14, and Frank Swoboda, *To The AFL-CIO, There's No Place Like Home,* THE WASH. POST, March 16, 1997 at H1, H6.

quoted as stating that this switch in tactics was infinitely preferable to NLRB procedures which move in a slow, almost archaic fashion. In *The Washington Post* article, the director of the AFL-CIO's new Department of Organizing called the National Labor Relations Act a "death trap" and advised young organizers to ignore the traditional approach of filing a petition with the Board.

Some employer organizations reacted with dismay to these proposals, stating that they were a vehicle for unions to coerce employees and suggesting that Congress should look at the National Labor Relations Act to preclude unions from engaging in such tactics. In a sense, this is a role reversal on the part of the unions which once saw the Act and the Board as providing a badly-needed framework through which employees could choose or not choose unions for the purpose of collective bargaining -- although the position of the parties resembles the debate which took place in the 1980s when Lane Kirkland, then Secretary-Treasurer of the AFL-CIO, suggested a repeal of the Act would serve labor's interest by allowing both parties to engage in their own self-help tactics or to go, as he put it, *mano a mano* or hand-to-hand.

After *The New York Times* story appeared, the very next day another writer wrote another piece dealing with the Board and labor law.[2] In this article the writer noted that unions, after a Detroit newspaper 19-month strike, had unconditionally offered to return to work and that the unions, in so doing, had ". . . asked the regional office of the National Labor Relations Board to seek an injunction in Federal District Court to force the papers to take returning strikers back immediately." Here, the unions simultaneously announced that they would pursue an alternate route, as well as a variety of techniques to "pressure" the companies to hire the strikers -- though last Friday a unanimous Board disapproved the settlement of secondary boycott charges between the General Counsel and the unions and, thus, opened the door to litigation against some of these tactics.[3] Meanwhile, four Republican Senators who are members of the Senate Committee on Labor and Human Resources, wrote to me expressing concern about " . . . reported statements of the Detroit regional director that the NLRB is contemplating an injunction in Federal Court on the issue of retention of replacement workers, and whether such a legal move by the Detroit region would be appropriate legal proceedings before the full Board."

And here we have role reversal yet again. For now the unions, in contrast to their statements about organizational tactics and their need to keep away from the Board, relied very much upon some of the Board's procedures. Employers may have a different view of this issue -- and certainly some of the Republican members of the Senate seem to be concerned about the potential for legal intervention in this situation.

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2 Iver Peterson, *After Detroit Strike, Unions Switch Tactics,* THE NY TIMES, March 11, 1997, at A19.

3 *Teamsters Local 372, et al. (Detroit Newspapers)*, 323 NLRB No. 38 (March 14, 1997).

Comparisons are inevitably inexact. The unions apparently believe that a request for temporary injunctive relief providing that the strikers go back to work would be better than resolving matters through self help in the streets. Once it became clear that the strike, hobbled in substantial part by the employer's ability under the Supreme Court's 1938 *Mackay* decision[4] to permanently replace economic strikers, was having little effect, they chose the law.

As I told the Republican Senators who wrote me, the matter is *sub judice* and we at the Board cannot and will not resolve any of the issues involved until and unless the General Counsel seeks authorization for an injunctive proceeding. At that point I will examine the submission of all parties.

Presumably, however, the unions' stance in the organizational arena is different because Section 10(j) does not apply *directly*. That is to say, there is no order that the Board can seek which would put in place an election within 10 days or some equivalent period as the Canadians have it north of the border. Section 10(j) comes into play only in the event of employer retaliatory conduct or union misconduct.

As I have indicated in my 3-Year Report, our procedures have been expedited over these past few years.[5] At this time we are considering anew the question of when we can proceed to conduct the secret ballot box election amongst workers where there are challenges as to some of the employees' eligibility. Generally, we have followed a policy of holding such elections where 10 or 15 percent are in dispute and, in some instances, in the Washington and Baltimore area, have held elections where more than 30 percent of the employees are in dispute and where lengthy hearings would delay access to the ballot box. We are looking at our decisions in *Angelica Healthcare Services Group, Inc.*[6] and *Barre National*[7] where we held that all parties always are entitled to a statutory hearing -- to determine how these hearings may be managed effectively. Our interest is both to provide protection for all parties who participate in them and at the same time to meet the objective now contained in the rules of providing a "concise" hearing -- i.e., one which will conclude in a reasonably prompt manner.

More recently, in *Mariah, Inc.*,[8] the Board emphasized that the role of a hearing officer in a representation proceeding is to ensure a record that is concise as well as complete. In *Mariah*, the Board found that the hearing officer correctly exercised her authority to exclude irrelevant evidence and to limit a party to an offer of proof.

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4 304 U.S. 333 (1938).

5 See Gould, *Gould Cites Needs for Balance, Simplicity, Speed,* Bureau of National Affairs, *Daily Labor Report,* No. 45, March 7, 1997, at A-1, E-1.

6 315 NLRB 1320 (January 18, 1995).

7 316 NLRB 877 (1995).

8 322 NLRB No. 114 (November 25, 1996).

In a sense, the statute contains a number of themes which are frequently at tension with one another. On the one hand, the Preamble sets the tone for the entire Act by encouraging the practice and procedure of collective bargaining as a policy of the United States. This means that the Board, in order to fulfill the objectives of the statute, must actively promote, procedurally and substantively, initiatives which insure, within the parameters established by the United States Supreme Court precedent, that workers have a genuine opportunity to decide if they wish to choose the collective bargaining process and to effectively participate in it.

On the other hand, the philosophy best manifested by the so-called "freedom of contract" cases in the duty-to-bargain area, is that the parties are to be left to their own devices with minimum interference by the Board or by government generally. Where the right to strike is involved, the Taft-Hartley Amendments to the Act come directly into play in connection with prohibitions against secondary boycotts and violent strikes and the provision for an 80-day injunction in national emergency disputes -- though the last mentioned provisions occur, along with the demise of the Cold War, in a diminishing number of circumstances. The current American Airlines dispute, occurring under the Railway Labor Act which contains different procedures, involves a situation where the government literally promotes the process of collective bargaining but may, though special statutes enacted by Congress in the past to deal with railway disputes, directly intervenes to dictate the substance of the agreement to parties through compulsory arbitration.

A good example of both of these themes of autonomy and intervention present in one case is our important decision in *Management Training Corporation*,[9] where we reversed the *ResCare* doctrine[10] and established a new test for assertion of jurisdiction over employers who operate pursuant to contracts with government entities. Since the statute excludes public employers, but gives the Board jurisdiction over private employers, our view was that jurisdiction was properly extended to them even though they have contracts with government. Judge Wilkinson, for a unanimous U.S. Court of Appeals for the Fourth Circuit, in *Teledyne Economic Development*,[11] agreed with us after examination of Section 2(2) of the Act, which exempts public employers from coverage. Said Judge Wilkinson:

> There is nothing ambiguous about this language. By its terms, section 2(2) exempts only government entities or wholly owned government corporations from its coverage -- not private entities acting as contractors for the government. When enacting section 2(2), Congress was surely aware that private employers contracted with government entities to provide needed goods and services. Congress could not have intended to compel the Board to decline jurisdiction over private employers based upon constraints that their

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9 317 NLRB 131 (July 28, 1995).

10 280 NLRB 670 (1986).

11 No. 96-1630, 96-1790, slip. op. at 5 (4th Cir. March 6, 1997).

government contracts might impose upon the collective bargaining process. If it had so intended, it would have exempted private contractors as well as governmental entities from the Act.

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If Teledyne wishes to press for the amendment of section 2(2), it must present its case to Congress.

There is yet another theme present in *Management Training*. If we had decided otherwise and adhered to *stare decisis*, we would have produced a doctrine which would have both invited litigation and government involvement about what would be important in the employment relationship. The Board's opinion in *Management Training* emphasized the wide variety of subject matter that parties might consider and the fact that the National Labor Relations Act encourages voluntary autonomous treatment of issues by the parties themselves on the basis of what is important to them -- not the government!

These themes -- avoiding wasteful litigation and involvement in the substance of the agreement between the parties are ones which the Act encourages the Board to follow. Two weeks ago, when I issued my 3-Year Report, I focused upon a wide variety of areas where I think that these objectives have been furthered by the Board or by my own opinions in a variety of contexts.

Part of the work that I have tried to undertake since becoming Chairman three years ago is that of promoting the objectives outlined above through the demystification of our law, so that we speak in clear and simple terms and in which the parties can understand us. Sometimes, I disagree with the precedent which is binding upon us, but I am obliged to follow it when fashioned by the Supreme Court.

The cases involving union access to private property are good examples of this.[12] Another example might be the area of union security agreements, including cases authored by Justice White, whose opinions elsewhere have created considerable confusion by virtue of both their vagueness[13] or impracticality.[14] *NLRB v. General Motors Corp.*,[15] in its

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[12] Compare my position in *Union Organizational Rights and the Concept of 'Quasi-Public' Property*, 49 MINN. L. REV. 505 (1965) with my concurring opinions in *Makro Inc. and Renaissance Properties Co., d/b/a Loehmann's Plaza*, 316 NLRB 109 (January 25, 1995); *Leslie Homes Inc.*, 316 NLRB 123 (January 25, 1995).

[13] Good examples of these characteristics are *Buffalo Forge v. United Steelworkers*, 428 U.S. 397 (1976). See Gould, *On Labor Injunctions Pending Arbitration: Recasting Buffalo Forge*, 30 STAN. L. REV. 533 (1978) and *NLRB v. Burns Security Services*, 406 U.S. 292 (1972), which triggered Board decisions such as *Spruce-Up*, 209 NLRB 194 (1974), enfd. on other grounds 529 F.2d 516 (4th Cir. 1975), which are erroneous in my view. See my concurring opinion in *Canteen Company*, 317 NLRB 1052 (June 30, 1995), enforcement granted, 103 F.3d 1355 (7th Cir. 1997).

insistence that union membership can be defined as only requiring the payment of periodic dues and initiation fees is, in my judgment, a decision that was erroneous. I think that the statute is consistent with an approach which would allow unions and employers, where the union enjoys majority support, to negotiate an agreement which requires full membership obligations, as well as the payment of initiation fees and dues. This, it seems to me, is quite consistent with one of the basic themes which runs through *NLRB v. Allis Chalmers Mfg. Co.*[16] where the Court held, *albeit* by divided 5-4 vote, that unions have the authority to fine strikebreakers when they are "full members." But *Allis Chalmers* compounded a problem which was first presented in *General Motors*, i.e., it now assumes that workers would only *voluntarily* assume full membership obligations, since union security agreements only oblige them to be limited members.

For years, I have lectured Labor Law I students at Stanford Law School and, in providing them with an overview during the first few weeks, have discussed this problem and advised them that workers are only obliged to assume "limited membership" under *General Motors*, as a condition of employment, i.e., the payment of dues and initiation fees. After discussing this with them, and relating my contact with a variety of collective bargaining agreements over the years which only speak in terms of "membership" and do not define it along the lines of dues and initiation fees, and recounting discussions with union and employer officials who are completely unaware of this distinction, I then have said to them: "Now, you are amongst a small group of individuals in the country who have knowledge of this. Many lawyers -- sometimes even labor lawyers -- don't know it."

Now by virtue of our decisions in the *Beck*[17] cases, workers, business people and union officials will know that the *General Motors* distinction exists no matter how ill-founded it is as a matter of policy. In a couple of lead decisions issued in 1995, the Board held that a union has an affirmative obligation to advise employees that they have a right to be or remain a non-member and that non-members have the right to object to paying for union activities which are not germane to the union's duties as the bargaining agent -- and to obtain a reduction of fees for activities not germane to collective bargaining. We devised procedures and have answered a number of questions which have arisen as a result of *Beck* which applies some of the reasoning of public sector and Railway Labor Act cases to our statute.

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14 See *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435 (1984) and Gould, *The Burger Court and Labor Law: The Beat Goes On -- Marcato*, 25 SAN DIEGO L. REV. 51 1987. Of course the applicability of that decision to the National Labor Relations Act is still pending before us and I express no view on that issue. See *Connecticut Limousine*, Case 34-CB-1763.

15 373 U.S. 734 (1963).

16 388 U.S. 175 (1967).

17 *Communication Workers v. Beck*, 487 U.S. 735 (1988).

In *Weyerhaeuser Paper Co.*,[18] we held that the *Beck* notice must be given to members as well as non-members. We said:[19]

> We find that the rationale of *California Saw* for concomitant notice of *Beck* and *General Motors* rights applies with no less force to those who are still full union members and who did not receive those notices [of their right to be less than full union members and to pay dues which are germane only to bargaining representation for non-members] before they became members. Current members must be told of their *General Motors* rights if they have not previously received such notice, in order to be certain that they have voluntarily chosen full membership and a concomitant relinquishment of *Beck* rights.

Thus, what we did in *Weyerhaeusr* was to specifically advise all employees not only of their *Beck* rights but also of their *General Motors* right not to become full members – something that was virtually unknown in most employment relationships throughout the country.

Then last week, in *Rochester Manufacturing Company*,[20] we followed the same principles and stated that even where the General Counsel's complaint failed to allege a union's unlawful failure to provide *Beck* notice to all employees in the bargaining unit, we would nonetheless fashion a remedy requiring *all* unit employees be given notice of the *Beck* and *General Motors* rights.

When we came to Washington in early 1994, not one single *Beck* case had issued in the six years subsequent to the Supreme Court decision in *Beck*. Now, 13 such cases have issued and more will follow. As Chairman, I am constantly urging, through conversations and memos, that we get these cases out. Be assured also that we are doing our job in accordance with law and precedent, no matter how distasteful some of the policy elements may be.

Let me conclude by stating that whatever failings the Agency and the law may possess respectively, I can assure you that we have acted in an impartial and evenhanded manner when one examines all our work objectively over these past three years. That comes through loud and clear from what we have done, both procedurally and substantively, and I think that our disapproval of the settlement between the General Counsel and the union of secondary boycott cases involving Detroit newspapers last week again demonstrates the fact that we apply the law, as written, fairly and always attempting to assume the actual intent of the framers of the statute.

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18 320 NLRB 349 (December 20, 1995).

19 The panel consisted of myself, and Members Browning, Cohen and Truesdale.

20 323 NLRB No. 36 (March 12, 1997).

Finally, I want to pay tribute here this morning, as I did earlier this week, and as I will whenever I have the opportunity to do so in the coming months and years, to the very fine work of my Chief Counsel who retires and whose last working day with the Agency is tomorrow.

Bill Stewart, as Chief Counsel to the Chairman, has been a tower of strength for me these past three years and has been my right hand in the many difficult situations that we have encountered both within and without the Agency during that time. He has been the heart and soul of the Agency these past 3 years.

The National Labor Relations Act has an enduring legacy which has gone far beyond that of all other industrialized countries of comparable size. Great Britain, Germany and France all have changed their systems and laws within this comparable period. None, save the Scandinavian countries – not even Australia and New Zealand which have lurched in radically different directions over the past few years – have seen their statute or basic labor law system last so long.

But as I said on Tuesday at a ceremony in honor of Bill: "The enduring legacy of this Agency lies not in the imperfect law which we administer, but rather in its unyielding commitment to excellence to public service exhibited by so many of first-rate career civil servants. Bill Stewart's life and work here, an unrivaled record at all levels of the Agency, best symbolizes that tradition."

President Clinton, in writing to Bill on March 18 spoke of his contributions to the Agency as being "unparalleled."

And so I want to thank Bill again for all of his good help to the Agency, to the Nation and to me personally. Without Bill Stewart, and people like him, we could not make the contribution that we do. His work serves as an inspiration to me and so many others to keep on with the task at hand while we have the honor and privilege to serve in public office.

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